

# **Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others***

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## **I. INTRODUCTION**

The Community institutions were faced with an area in which harmonisation, yet again, was deemed necessary: the harmonisation of rules on minerals and vitamins. The result was Directive 2002/46/EC of the European Parliament and the Council on the approximation of the laws of the Member States relating to food supplements (hereinafter: The Directive or the Food Supplements Directive). This Directive aims to harmonise certain features about food supplement products and uses positive lists<sup>1</sup> to specify the supplements which can be freely marketed within the Community – one of the key elements to the Directive.

Understandably, it was a concern for businesses in this industry as the Directive introduces restrictions on marketable food supplements,<sup>2</sup> thus significantly limiting their trading activities. Nonetheless, the Directive allows for two derogations until 31 December 2009; firstly, where supplements excluded from the list could be marketed if they were already marketed in the Community before the Directive enters into force, or, secondly, if there is no unfavourable opinion from the European Food Safety Authority about the substance on the basis of a dossier submitted by the Member State no later than 12 July 2005.<sup>3</sup> As can be seen, however, the derogation clause has a temporal limit which explains why the stakes are high for the applicants should the Directive be unsuccessfully challenged, hence the attempt to confront the validity of the Directive on several grounds.

## **II. BACKGROUND**

The case was brought by Alliance for Natural Health and Nutri-Link Ltd (C-154/04), and the National Association of Health Stores and Health Food Manufacturers Ltd (C-155/04) before the High Court of Justice England and Wales, Queen’s Bench Division (Administrative Court) for a judicial review of national regulations which transposed the Directive in question. The applicants challenged the validity of Articles 3, 4(1) and 15(b) of the Directive on the following premises: (a) inadequacy of Article 95 EC being the legal basis; (b) infringement of Articles 28 and 30 EC and/or Articles 1(2) and 24(2)(a) of Regulation (EC) No 3285/94; (c) infringement of the principle of subsidiarity, (d) the principle of proportionality, (e) the principle of equal treatment; (f) infringement of Article 6(2) EU, read in light of Article 8 of the European Convention of Human Rights (ECHR) and Article 1 of the First Protocol to, the

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<sup>1</sup> Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements (Food Supplements Directive) [2002] OJ L183/51, Annex I and II

<sup>2</sup> Food Supplements Directive (n 1), Articles 3, 4(1) and 15(a)

<sup>3</sup> Food Supplements Directive (n 1), Article 4(6)

European Convention on Human Rights, and of the fundamental right to property and/or the right to carry on an economic activity; (g) breach of Article 253 EC.<sup>4</sup>

In order to fully expand on the issue, I have limited myself to one of the most interest aspects of the case, being the Court's assessment of the legal basis, for the purpose of this Commentary.

### III. ON THE LEGAL BASIS: THE CLAIMS, THE JUDGEMENT AND A CRITICAL COMMENTARY

The dispute over whether a legislative act is adopted on the correct legal basis is not unheard of.<sup>5</sup> In this case, the applicants claimed that the prohibitions contained in the Directive does not contribute to the improvement of the conditions for the establishment and functioning of the internal market.<sup>6</sup> This claim is based on the view that the Directive placed great emphasis on public-health considerations, and thus Article 95 constituted a misuse of power since the Community does not have the competence to harmonise public-health legislation.<sup>7</sup> Furthermore, Articles 3, 4(1) and 15(b) of the Directive were considered to be contrary to the principle of the free movement of goods within the Community which it must adhere to when adopting measures based on Article 95 EC.<sup>8</sup> These provisions, as the applicants added, also restrict trade with third countries and should have been adopted on a different legal basis, namely Article 133 EC.<sup>9</sup>

In addressing the issue concerning the legal basis, the Court reiterated the general framework that while the mere findings of disparities between national rules cannot enable measures to be taken based on Article 95 EC, it must also be that such disparities are to cause obstacles to the fundamental freedoms and directly affect the functioning of the internal market.<sup>10</sup> Consequently, the measure adopted must be designed to prevent them.<sup>11</sup> Having established these conditions, the Court decided that they were fulfilled and thus allowed the Community legislature to rely on Article 95 EC. This was substantiated by reference made to the complaints received by the Commissions services about traders' encounter with obstacles while marketing products between Member States.<sup>12</sup> This unequivocally affirms that the obstacles to the fundamental freedoms were not just 'likely'<sup>13</sup>; they were immediate issues that triggered the Community legislature to act by way of harmonisation.

With regards to the Directive's effect on trade with third countries and public-health consideration, the Court was rather brief on each issue. For the former, the Court identified the

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<sup>4</sup> Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECLI:EU:C:2005:449, para 22

<sup>5</sup> E.g. Case C-300/89 *Commission v Council* [1991] ECLI:EU:C:1991:244, Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising I)* [2000] ECLI:EU:C:2000:544, Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECLI:EU:C:2002:741

<sup>6</sup> *Alliance for Natural Health and Others* (n 4), para 25

<sup>7</sup> *Ibid.*

<sup>8</sup> *Alliance for Natural Health and Others* (n 4), para 26

<sup>9</sup> *Ibid.*

<sup>10</sup> *Alliance for Natural Health and Others* (n 4), para 28

<sup>11</sup> *Alliance for Natural Health and Others* (n 4), para 29

<sup>12</sup> *Alliance for Natural Health and Others* (n 4), para 36-38

<sup>13</sup> *Alliance for Natural Health and Others* (n 4), para 29

effect as being incidental<sup>14</sup> which confirms the Advocate General's view that it is a 'side-effect'<sup>15</sup> of the Directive. This can be understood when a clear distinction is to be made between a situation where a restriction was directly placed on products from third countries entering the Community and restriction on the marketing of products from third countries once they have been imported into the Community. It is as the Advocate General rightly explained; as long as the products from third countries are in compliance with the Directive, they could be marketed freely just as well.<sup>16</sup> This negates the possibility of using Article 133 EC as an alternative legal basis. As for the latter issue, the Court referred to the fact that Article 95 EC itself still requires that high level of protection of health must be guaranteed.<sup>17</sup> Therefore, the Court concluded that public-health considerations could not invalidate the Community legislature's reliance on it as a legal basis in light of the fulfilment of the preconditions for the Community legislature to take action based on Article 95 EC.<sup>18</sup> This facet of the case is, in my opinion, quite interesting.

Following the applicants' line of argument that the Directive's underlying theme was public-health, the remnant of the familiar *Tobacco Advertising I* can be found since both cases challenged the choice of legal basis through similar line of reasoning. However, the ultimate outcomes of both cases drastically differed; while the applicants in this case could not convince the Court that the Directive was an attempt to harmonise national legislation on human health,<sup>19</sup> the applicants in *Tobacco Advertising I – Germany* – successfully invalidated the European Parliament and the Council of the European Union's Article 95 as a legal basis.<sup>20</sup> A closer analysis reveals why the Court appropriate referred to this case once despite several points of similarities in its assessment of the Directive's legal basis.

The disputed directives were alike to a great extent. In *Tobacco Advertising I*, the challenged Directive 98/43/EC (hereinafter: the Tobacco Advertising Directive) took notice of the existence of disparities between national rules on the advertising and sponsorship of tobacco products which led to the obstacles to the functioning of the internal market<sup>21</sup> like the Food Supplements Directive.<sup>22</sup> Both also contained several prohibitions, although it must be noted the Tobacco Advertising Directive was characterised as a 'blanket ban'<sup>23</sup> whereas the Food Supplements Directive achieved, arguably, a similar effect through the use of positive lists – which effectively prohibited the marketing of up to three hundred nutrients<sup>24</sup> – and prohibitions

<sup>14</sup> *Alliance for Natural Health and Others* (n 4), para 41

<sup>15</sup> Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECLI:EU:C:2005:199 Opinion of AG Geelhoed, para 25

<sup>16</sup> Opinion of AG Geelhoed (n 14), para 45

<sup>17</sup> Treaty establishing the European Community (Nice consolidated version) [2002] OJ C325/69, Article 5(3)

<sup>18</sup> *Alliance for Natural Health and Others* (n 4), para 40

<sup>19</sup> *Ibid.*

<sup>20</sup> *Tobacco Advertising I* (n 5), para 115

<sup>21</sup> Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (Tobacco Advertising Directive) [1998] OJ L213/9, recitals 1 and 2

<sup>22</sup> Food Supplements Directive (n 1), recital 2

<sup>23</sup> Maletic I, 'Recent Developments in the European Market: More Public Health and Less Tobacco Advertising.' (2008) 19(1) KLJ 169, 171

<sup>24</sup> LeCong F, 'Food Supplements Directive: An Attempt to Restore the Public Confidence in Food Law.' (2007) 29(1) Loy LA Int'l & Comp L Rev 105, 105

of trading of products not in compliance with this directive.<sup>25</sup> Though the applicants in both cases casted doubt on the core theme of the directives as being public-health centred, the few – yet significant – dissimilarities between the disputed directives together with the difference in the Court’s approach are what marked the distinction between the two cases.

With regard to the directives, the Tobacco Advertising Directive contained a much more exhaustive scheme of prohibition as noted above, in comparison to the restrictions arising from Articles 3, 4(1), 15(a) of the Food Supplements Directive. The exhaustiveness was such that ‘cannot be justified by the need to eliminate obstacles to the free movement.’<sup>26</sup> Another vital point is the fact that the directive did not ‘ensure free movement of products which are in conformity with its provisions.’<sup>27</sup> This was a decisive factor because it contributed to Germany’s argument and the Court’s finding that the directive could not have contributed to the elimination of obstacles for the free movement of goods.<sup>28</sup> This is not the case for the Food Supplements Directive; indeed, there was a provision ensuring free movement of products that were in compliance with the Directive which weakened the challenge of the legal basis on grounds of public-health because the internal market dimension of the Directive was reinforced by the inclusion of a market-access clause.<sup>29</sup>

As for the approach in answering the question, in *Tobacco Advertising I*, the Court laid down two considerations for determining whether the directive was adopted on the proper legal basis after following the Advocate General’s opinion that the centre of gravity test was only applicable ‘where there is a dispute as to whether a measure should have been adopted by reference to one or other of the two possible legal bases.’<sup>30</sup> Equally applicable to *Alliance for Natural Health and Others*, both Courts thus did not employ centre of gravity. Alternatively, the Court in *Tobacco Advertising I* shifted its focus to ascertaining whether the measure in fact pursue objective stated<sup>31</sup> and whether it contributed to the elimination of obstacles<sup>32</sup> – both of which were answered negatively having considered the Directive in its entirety. This structure of addressing the legal basis greatly differed from the Court’s approach for *Alliance for Natural Health and Others*. Not only did the Court in this case relied solely on the established link between the complains received and obstacles to the internal market, the Court also limited its assessment to three provisions which differed from the Advocate General’s view that ‘the contested Community provisions should be examined in the context of the Directive as a whole.’<sup>33</sup>

Had the Court follow this route, perhaps the consideration for Article 4(7) of the Directive could have made a difference. This provision stipulates that the Member States were not barred from maintaining existing national restrictions or bans on food supplement products not included in the positive lists provided for in the Directive. Borrowing from the Court’s consideration in *Tobacco Advertising I*, article 4(7) of the Directive could have been examined in the context of its capability of casting doubt on whether the Directive contributes to the elimination of obstacles. This provision implies that the existence of disparities, and thus also obstacles, could persist. Therefore, even though disparities in national rules could be reduced

<sup>25</sup> Food Supplements Directive (n 2)

<sup>26</sup> *Tobacco Advertising I* (n 5), para 99

<sup>27</sup> *Tobacco Advertising I* (n 5), para 101

<sup>28</sup> *Tobacco Advertising I* (n 5), para 104

<sup>29</sup> Food Supplements Directive (n 1), Article 11(1)

<sup>30</sup> Case C-376/98 Federal Republic of Germany v European Parliament and Council of the European Union [2000] ECLI:EU:C:2000:324 Opinion of AG Fennelly, para 68

<sup>31</sup> *Tobacco Advertising I* (n 5), para 85

<sup>32</sup> *Tobacco Advertising I* (n 5), para 95

<sup>33</sup> Opinion of AG Geelhoed (n 14), para 23

through partial harmonisation, the Directive's ability to eliminate obstacles does not appear to be substantial from this perspective. This doubt can be added by the use of positive lists since Member States which did not initially prohibit the marketing of certain supplements in the annex would now have to prohibit them.<sup>34</sup> Logically, a negative list system was suggested but the Court denied it as it 'might not suffice to achieve the objective of protecting human health.'<sup>35</sup> Despite the Court reaffirming that Articles 95 and 152(1) EC call for the Community to ensure high level of health protection,<sup>36</sup> this statement may be perceived as running contrary to the choice of Article 95 EC as a legal basis since it could demonstrate that human health considerations have gone beyond '[playing] a part in the formulation of the provisions'<sup>37</sup> in the Directive. Support for this can be found in the Explanatory Memorandum in the proposal for this Directive where it can be observed that mentions of health concerns were far more prevalent than obstacles to the internal market. It seems that harmonising certain elements of food supplement products to ensure safety and health protection is what led to the decrease in the disparities between the national rules, and merely incidentally grazes the supposed objective of eliminating obstacles in the internal market in this sense.

Having said that, the critical difference between the two cases must be revisited, namely the market-access clause in which exempted the Food Supplements Directive from being a repeated case of the annulled Tobacco Advertisement Directive. It can be said that this case is another manifestation of *R v. Secretary of State ex parte BAT and Imperial Tobacco*<sup>38</sup> in terms of disputes over the choice of legal basis.

#### IV. CONCLUDING REMARKS

The significance of this particular issue in this case lies in the fact that it deals with the limit of the Union's ability to harmonise national rules through measures adopted on the basis of Article 95 EC. While the Court curbed the reliance on Article 95 EC by making clear that Article 95 EC does not allow the adoption of measures which only incidentally harmonises market conditions within the Union,<sup>39</sup> this case shows that the scope of Article 95 EC can be broadened where the Court sees sufficient link between the disputed measure and the internal market, envisaged in Article 26 TFEU, dimension of harmonisation, which must be supported by a market-access clause. In light of the foregoing, it may be fair to agree that this case which deals with the legal basis, and thus also the limits of competence of the Union has been 'converted into no more than a "drafting guide" for the EU legislature.'<sup>40</sup> Ultimately, it is unsurprising that when the internal market is in jeopardy, the Union's fundamental freedoms may prevail. In this case, the Court's decision regarding the validity of legal basis was anticipated.

<sup>34</sup> Food Supplements Directive (n 1), Article 15(b)

<sup>35</sup> *Alliance for Natural Health and Others* (n 4), para 70

<sup>36</sup> *Alliance for Natural Health and Others* (n 4), para 31

<sup>37</sup> *Alliance for Natural Health and Others* (n 18)

<sup>38</sup> Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECLI:EU:C:2002:741, paras 74-75

<sup>39</sup> E.g. Case C-155/91 *Commission v Council* [1993] ECLI:EU:C:1993:98, case C-209/97 *Commission v Council* [1999] ECLI:EU:C:1999:559

<sup>40</sup> Weatherill S, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has Become a Drafting Guide.' (1) 12(3) *German LJ* 827